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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 742.

AXEL HAWKINSON, PETITIONER AND APPELLANT BELOW,

VS.

GEORGE GASTON JOHNSTON, RESPONDENT AND APPELLEE BELOW.

GEORGE GASTON JOHNSTON, RESPONDENT AND APPELLANT BELOW,

VS.

AXEL HAWKINSON, PETITIONER AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

AXEL HAWKINSON, PETITIONER AND APPELLANT BELOW,

VS.

GEORGE GASTON JOHNSTON, RESPONDENT AND APPELLEE BELOW.

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VS.

AXEL HAWKINSON, PETITIONER AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Axel Hawkinson, respectfully shows to this Honorable Court:

A.

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

The Circuit Court of Appeals for the Eighth Circuit affirmed District Court judgment for damages claimed by respondent as owner of two-thirds interest in a Kansas City, Missouri, vacant lot. Judgment was based on alleged anticipatory repudiation of covenants in a 99-year lease for installment payments of quarterly rent and taxes to accrue during ten future years (Tr. 49; opinion 100 to 113). The opinion states (Tr. 103) no Missouri court appears to have passed upon the precise point and (Tr. 104) no Missouri decision purports to have applied the anticipatory breach doctrine to leases as part of the common law as it existed prior to 1607. Opinion Note 6 refers to a few of many authorities declaring the doctrine did not apply to leases at common law (Tr. 104). It overrules them by disregard together with controlling opinions of the Missouri Supreme Court *En Banc*, reference to which is omitted, to rest final decision on a personal philosophy expressed in Opinion Note 23 (Tr. 113). That philosophy contravenes the basic principles of Missouri landlord and tenant law, and conflicts with its declared social and economic state public policy consistently followed since at least 1855. The opinion concedes the doctrine is denied for leases in important common law states such as Massachusetts, New York, Illinois, Ohio, Virginia and Maine (Opinion Note 3), but affirms its application in Missouri. It overrules for Federal Courts the latest expressions of the Missouri Supreme Court *En Banc* without dignifying them by comment (Argument, Points I and II).

The novelty of plaintiff's suit perhaps intrigued the attention of the courts below so that only the right of plaintiff to maintain his action was deemed important. Incidental minor consideration only was accorded to all substantive, absolute, affirmative defenses pleaded, which were so self-evident under Missouri law that petitioner

deemed it a useless formality to proceed with a declaratory action in the Missouri courts to have them so established. There they would be readily recognized and enforced. There also the lease would be enforced as the parties contracted and not as re-fashioned only by authority of the complaint.

From the opinion (Tr. 101) we quote:

> "Some minor contentions also are raised by defendant but we do not regard any of these as controlling and they will, therefore, be referred to only briefly and incidentally."[1]

Most of the evidence (heard by the court without a jury) was presented by agreed statement (Tr. 40-48). Jurisdiction was based on diversity of citizenship and a purported amount in controversy (Tr. 1). That real jurisdiction was lacking is shown by argument, Point I. The first count of the complaint prayed for $19,885.80 as commuted value at 4% interest for thirty years rent in advance, less present commuted rental value (Tr. 3). The second count sought $11,678.32 for estimated future taxes for thirty future years likewise commuted at 4% interest (Tr. 4). The lease (Tr. 4-24) contains no provision for liquidation or commutation of future payments and has no interest or other formula to conform to the complaint or judgment rendered. State law provides none. Only $400 rent had accrued, if any was due after surrender.

The lease contains no covenant to accelerate rent or taxes and none for damages or indemnity to survive reentry or termination. The balance of the term if not terminated was 68 years. Judgment was for a total of

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[1]The situation was not invited. Petitioner briefed and argued his substantive points first and protested the classification (Tr. 117-118) in his petition for re-hearing, without avail. State rules of property declared by its courts are indeed without integrity if they may be brushed aside as "minor" with incidental rather than real consideration. This is denial of equal protection of laws and approaches closely to denial of due process of law.

$13,357.52, computed on ten years future rent and taxes (Tr. 48-49).

The lease was made in 1909, by Esther Gaston (who devised two-thirds interest in the lot to respondent upon her death in 1918), as lessor, and petitioner and his brother, as lessees (Tr. 81, 4-24). The other one-third of the fee, devised to Emma Brockman (Tr. 2), was purchased in 1918 by lessees, thus merging the fee and lease to that extent. Annual rent payable quarterly was reserved at $600 for the first five years; at $1,800 for the next fifteen years and at $2,400 from January 1, 1929, and thereafter.

All sums due to June 30, 1940, were fully paid by lessees, when after giving prior written notice (Tr. 47, Par. 16; 41-46, Pars. 7-12) of such intention, the premises were surrendered with claim of right so to do (Par. 13, Tr. 46) under lease provision (Tr. 15, Par. 15) reading:

> "* * * Provided that after the new building shall have been constructed, the personal liability of the lessees hereunder may be terminated by lessees having complied with all the terms and conditions of this lease which at that time lessees shall have agreed to perform, and by the lessees surrendering to the lessor the premises, the improvements thereon and the possession thereof."

The "new building" is defined in the lease (Tr. 9, Par. 10; 21, Par. 42) and was to be erected and paid for by lessees before January 1, 1914 (Tr. 21, Par. 41). Penal bond of $6,000 delivered concurrently guaranteed erection as agreed. Right of forfeiture was reserved (Tr. 15, Par. 23) as a lease remedy for breach of building or other covenants. Because of the elective alternative types of structures (Tr. 21, Par. 41) authorized, the lease recognized the building covenant was not enforceable by specific performance. Damages would be difficult to ascertain for the same reason. Therefore, $6,000, guaranteed by bond, fixed damages for possible breach. The building

covenant was not a continuing one but had to be either performed or breached on January 1, 1914 (Tr. 9, Par. 10).

If the building was completed during the optional period before 1914, lessees could terminate thereafter and before 1914. After 1914, erection was immaterial to exercise the surrender right to terminate further personal liability because on the mandatory building date, lessor was entitled to either have the building completed or collect the $6,000 bond with the additional lease right to forfeit for breach. No agreement provides for double recovery. *Lessor could not enforce the bonds and also require the building or again recover damages in addition to the bond if erection was not completed.* Obviously, by any construction, *on January 1, 1914, with the building covenant breached, lessees could pay the bond and all lease sums then due and surrender the premises to terminate further personal liability.* Lessor had the same reciprocal right. The answer pleaded that the building covenant was independent under Missouri law and did not form the entire consideration (Tr. 28, Par. 23). Its breach was made expressly compensable in damages fixed by and payable under the bond. The sole possible purpose of providing for both lease and bond was to protect lessor and allow her to recover on the bond if the lease was terminated for default prior to 1914 with its unaccrued covenants thereby discharged.

The original lessor was a Kansas City resident and knew the facts on January 1, 1914. It is clear from the admitted circumstances that she exercised her wisdom (although we admit the record is barren of direct evidence) and desired rent income payable at a rate three times the amount for the first five years and wanted to continue to have her taxes paid, rather than have any of the alternative kind of buildings erected, or even to collect her bond with loss of tenants. She knew from the lease that (Tr. 21, Par. 42) lessees owned the adjoining lot. If the property developed so a building would not be a liability, erection would follow by operation of economic

law. If it did not develop, she wanted no building to be surrendered, to be a liability to her. The building covenant thus was not extended by agreement. With full knowledge of breach, no collection of the bond was sought. That was inducement to the tenants to continue and pay the increased rental. Rent was accepted thereafter throughout her lifetime and subsequently to 1939 without ever a demand to build or pay the bond. The wisdom is manifest. The rent and taxes paid exceeded the amount of the bond many fold. The building was forever waived. By Missouri law duly pleaded (Tr. 31) (but disregarded by the courts below) that was equivalent to performance, beneficial to lessor (Argument, Point IV).

Respondent's devise in 1918 was two-thirds of the land without reference to lease or bond (Tr. 81). On its breach in 1914, the bond vested in lessor and at her death passed not to respondent but to her executors. He took the land subject to a lease with a fixed contract right of surrender and with the 1914 building covenant discharged by acts of the original contracting parties.

In 1939, respondent expressly affirmed the independent nature of both building covenant and bond. He filed suit Number 424, on that theory in the same District Court (Tr. 32-36). His first count alleged breach of lease covenants by failure to build by January 1, 1914, and prayed specific performance or alternative recovery of $27,500. He alleged he was two years old in 1918 when his two-thirds interest in the real estate was devised to him and that the statute of limitations was tolled until he reached his majority. His second count prayed for the $6,000 penalty of the bond. Motion to dismiss was filed because his complaint failed to state a claim on which relief could be granted (Tr. 36-39). It was sustained on both counts. The order of dismissal said the petition on its face showed that the statute of limitations had run against counts one and two (Tr. 81). The order specified nothing to the contrary so it operated as an adjudica-

tion on the merits under Rule 41 (b) of Federal Rules of Civil Procedure. No appeal was taken. The judgments became final. They are admitted by agreed statement (Par. 5, Tr. 41), and were pleaded in bar (Tr. 26) as *res judicata,* election of remedies (Tr. 27-31); waiver; estoppel by judgment and discharge of covenants by judgment and of conditions claimed. Discharge by reason of the common law rule that severance of the reversion and merger of title of part of lease and fee discharged a condition, if building was a condition for surrender, was also pleaded. The courts below (Tr. 94 and 101), by designating all substantive defenses as "minor" refused to consider the plea of these judgments as *res judicata,* estoppel or as a final adjudication on the merits and gave them no more effect than as a statute of limitations. To render the judgments, the District Court necessarily had to find as a basis that the building covenant was independent; that it was capable of only one breach and was not a continuing covenant; that performance and bond payment was waived and barred so no action could be maintained thereon. Under controlling precedents of this Court and the Missouri courts (to the citation of which no reference is made) these judgments were conclusive on the matters affirmatively pleaded by answer (Argument, Point III).

The shocking result and denial of due process by refusal to do more than to incidentally consider as "minor" the facts affirmatively pleaded and indisputably established by agreed statement more clearly appears because the judgments here rendered will conclude petitioner under the same rules of *res judicata* and estoppel which he pleaded (and which were denied to him) from relying on the judgments adverse to respondent and on the facts concluded thereby, in establishing substantive defenses in a connected case filed by respondent against petitioner on the same lease.

Count 3, in District Court Case No. 424 (Tr. 27), was tried by jury and verdict was directed for petitioner

against respondent on the basis of release "Exhibit C" (Tr. 39-40). Respondent appealed from the judgment on that count (Par. 16, Tr. 47). It was reversed for a new trial. Certiorari was sought by this petitioner in that case because reversal was based only on an inference first drawn in the opinion on appeal without support of and contrary to the record. There was no agreed statement so different viewpoints were possible in that case. Certiorari was denied October 13, 1941, in Number 183 by this Court at this term.

That case is now remanded for a new trial. Estoppel by the judgment in this case based only on doctrines contravening declared Missouri law, concludes substantive defenses otherwise there open to him.

The situation insistently demands review. Without it due process and equal protection of laws is not accorded to petitioner.

The existing situation, of course, was not contemplated nor intended by the Circuit Court of Appeals. Motion for rehearing was overruled here before certiorari was denied in Number 183. This court alone may protect and secure to petitioner his constitutional guarantees.

After suffering such adverse final judgments, respondent abandoned his original ideas and filed this complaint in which he affirms a surrender of the premises (Tr. 2) by lessees but says it was "repudiation" of the lease in its entirety without just cause. The opinion holds with him (Tr. 112).

His suit necessarily recognized termination of the lease. By Missouri law respondent's reentry and renting of the premises to mitigate his anticipatory damages, without notice that re-entry was for the tenants' benefit and not for the landlord's and that the landlord would hold the tenants for any loss or deficiency in rents (Tr. 46, 47), discharged the lease and all future covenants. Such Missouri law denies possibility of anticipatory breach of lease rent covenants payable in future installments.

The judgment below directly overrules the latest rulings of the Missouri Supreme Court, *En Banc*, on the same contentions (Argument, Points I and II).

The agreement statement (Tr. 41-43) establishes that in giving notice of intention to surrender, petitioner was acting in good faith under advice of counsel who joined in signing the notice which expressly specified:

> That the building covenant was an independent covenant; that it was so recognized by suit of respondent filed thereon; that the covenant was waived and is not now a covenant in the lease; that the lessees have and are given the right to surrender to terminate further personal liability.
>
> Notice of June 25, 1940 (Tr. 44-45), expressly states that all terms and conditions binding on the lessees were fully performed and that surrender would be made on June 30, 1940, to terminate further personal liability of lessees and that such surrender would be made free from and discharged of said lease; that all obligations were performed as established by judgment and decree of the United States District Court in case No. 424.

The entire record in that case is included in the agreement statement (Tr. 41) and the judgments rendered therein are expressly pleaded by answer (Pars. 14-33; Tr. 26-31).

Despite Missouri law and decisions of this Court that good faith assertion of rights is not repudiation of the contract, even though the contentions advanced are wrong, the opinion holds unjustifiable repudiation crystallized inchoate contingent future installment payments belonging only to the owner of the reversion at the time they accrue, into present existence to be paid to plaintiff, attenuated only by an interest rate of his selection.

Respondent leased his interest in the premises to another tenant. This constituted re-entry and discharged the lease. The details are reviewed under Argument, Point I.

Recovery was allowed respondent on a discharged lease, which contained no contractual provision to survive termination. Recovery was under a complaint not supported by his lease.

B.

STATEMENT OF THE BASIS FOR JURISDICTION.

(a) The writ of certiorari is applied for under Rule 38 of this Court and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347 (a)), and is the proper remedy.

(b) The date of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit affirming judgment of the District Court is September 22, 1941 (Tr. 113; opinion same date, Tr. 100). Motion for rehearing was filed October 3, 1941, and was overruled October 11, 1941, without opinion (Tr. 131-133).

(c) The following cases also sustain jurisdiction:

Erie R. R. Co. v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Klaxon Co. v. *Stentor Elec. Mfg. Co.*, 312 U. S. ....., 61 S. Ct. 1020.

Griffin v. *McCoach*, 312 U. S. ....., 61 S. Ct. 1023.

Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202, 58 S. Ct. 860.

(d) The opinion is printed (Tr. 100-113) but not yet reported. Order was entered October 18, 1941, for stay of mandate for thirty days to permit filing this petition (Tr. 134).

C.

QUESTIONS PRESENTED.

1. Where the amount in controversy in a diversity of citizenship case could not exceed $400 for rent for the July quarter if surrender of the lease sued on was accepted

and Missouri law was declared and applied and all liability was discharged if surrender of the lease was accepted, did the lower courts acquire any real jurisdiction by applying the doctrine of anticipatory repudiation to unaccrued lease covenants to enter judgment for $13,357.52, when the Missouri Supreme Court, *En Banc*, and its appellate courts have consistently declared the doctrine does not apply to Missouri leases? Was this denial of due process?

2. Did the courts below accord petitioner equal protection of laws in entering and affirming judgment of $13,357.52 on a Missouri 99-year lease on the theory of anticipatory repudiation of unaccrued covenants, when the doctrine has been consistently denied for leases by the Missouri Supreme Court, *En Banc*, and its appellate courts?

3. Was petitioner accorded equal protection of laws by the entry and affirmance of judgment for $13,357.52 on a Missouri 99-year lease on the theory of anticipatory repudiation of unaccrued covenants, where he surrendered the premises under claim of right based on a lease provision and the landlord accepted surrender, rented the premises to a new tenant and pleaded the surrender as "repudiation," and where the highest Missouri appellate courts have consistently held that even after an unjustified abandonment or surrender of leased premises the acceptance thereof or a re-entry discharges all liability for damages on unaccrued lease covenants?

4. Under the circumstances disclosed in the three foregoing questions, was the petitioner accorded equal protection of laws under Constitution of the United States, Art. IV, Sec. 2, and the Fourteenth Amendment, and was he denied due process of law?

5. Did the lower federal courts disregard the doctrine of *Erie R. R. Co.* v. *Tompkins*, where they refused to give the same effect to a federal district court judgment that would be given to the same judgment by the Mis-

souri courts if it was pleaded in the same way, as being *res judicata* and as constituting estoppel and election of remedies?

6. Did the lower federal courts repudiate the doctrine of *Erie R. R. Co.* v. *Tompkins*, where they refused to construe a Missouri lease according to Missouri law and refused to apply the Missouri law of waiver, and its law as to the effect of independent covenants, in accordance with controlling decisions of its appellate courts, and erroneously applied principles declared for and limited to option agreements which had no application to independent covenants?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The doctrine of *Erie R. R. Co.* v. *Tompkins* was not observed and the applicable state law was not declared and applied. Petitioner was not accorded equal protection of laws nor due process of law guaranteed under Constitution of the United States, Art. IV, Sec. 2, and under the Fourteenth Amendment, in that:

1. The total amount in controversy did not exceed $400 if Missouri law was declared and applied. If surrender of the lease was accepted by withdrawal of notice of non-acceptance and by re-renting to a new tenant and by affirmatively accepting a surrender as asserted "repudiation" by the complaint filed, all liability for unaccrued covenants was discharged under Missouri law. If it was not accepted, the highest possible recovery under state law was $400 for rent for the July quarter. The courts below were without real statutory jurisdiction. Apparent statutory jurisdiction was usurped by denying equal protection of laws and due process of law in refusing to follow Missouri law as declared by its Supreme Court, *En Banc*, and by its appellate courts, which have consistently denied application of the doctrine of antici-

patory repudiation to unaccrued lease covenants (Argument, Points I and II).

2. Equal protection of laws guaranteed to Petitioner by Constitution of the United States, Art. IV, Sec. 2, and by the Fourteenth Amendment, was denied by the judgment and decision below, where federal courts refused in a diversity of citizenship case to follow Missouri law as consistently declared by its highest courts that acceptance of surrender or actual or constructive re-entry after abandonment discharges all unaccrued covenants of a lease. Although surrender was accepted and re-entry was made, and the complaint pleaded an accepted repudiation (which discharged the lease), the courts below, in direct disregard of Missouri controlling cases which are not even mentioned in the opinion, held that the doctrine of anticipatory repudiation applied and entered judgment accordingly, although the lease contained no covenant to survive re-entry, and no covenant to support the complaint (Argument, Points I and II).

3. The courts below refused to apply the doctrine of *Erie R. R. Co.* v. *Tompkins* and refused to recognize or apply Missouri law as declared by its highest courts in failing to give the same effect to a federal district court judgment that would be given to it by the Missouri courts when it was pleaded as *res judicata*, estoppel and as an election of remedies (Argument, Point III).

4. The judgment and decision below likewise refused to construe a Missouri lease in a diversity of citizenship case according to Missouri law as declared by its highest courts and refused to declare and apply the Missouri law of waiver, and its law on the construction of independent covenants in the lease, and erroneously applied principles of law declared for and limited to option agreements, which has no application under Missouri law to independent covenants (Argument, Point IV).

5. The basic principles of Missouri Landlord and Tenant Law and the declared social and economic public policy of the State were set aside on important questions of local law, in direct conflict with controlling decisions of the Supreme Court of Missouri, *En Banc.*

E.

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a Writ of Certiorari be issued under seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the case of *Axel Hawkinson, Appellant,* v. *George Gaston Johnston, Appellee,* No. 11939, and *George Gaston Johnston, Appellant,* v. *Axel Hawkinson, Appellee,* No. 11943, to the end that this cause may be reviewed and determined by this Court as provided for in the statutes of the United States; and that the findings of said Circuit Court, to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

Axel Hawkinson,
Petitioner,

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AXEL HAWKINSON, PETITIONER AND APPELLEE BELOW.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTORARI.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not yet officially reported but appears in the record at pages 100 to 113.

II.

JURISDICTION.

The petition for the writ (*ante* page 10) states the grounds on which the jurisdiction of this Court is invoked. For brevity, that statement is not here repeated.

III.

STATEMENT OF THE CASE.

The petition, under the heading "Summary and Statement of Matters Involved" (*ante* pages 2 to 10), sets forth a full statement of the case. For brevity, that statement is not here repeated.

IV.

SPECIFICATIONS OF ERROR.

1. The courts below were without statutory jurisdiction because the total amount in controversy could not exceed $400, if Missouri law was declared and applied. If surrender of the lease was accepted, all liability was discharged and if it was not accepted, the total possible recovery under state law was $400 for rent for the July quarter. Apparent jurisdiction was usurped by refusing to follow Missouri law declared by its highest courts and by entering judgment on the theory of anticipatory repudiation of a lease, which doctrine has been consistently denied by the Missouri courts for lease contracts.

2. The courts below erred in ruling that the doctrine of anticipatory repudiation applies to leases in Missouri and erred in failing to declare and apply Missouri law as consistently declared by its highest courts, to the effect that an accepted surrender of a lease or actual or constructive re-entry after abandonment discharges all unaccrued covenants of a lease.

3. The courts below refused to declare and apply Missouri law as recognized by its highest courts and failed to give the same effect to a federal district court judgment that would have been given to it by the Missouri courts when it was affirmatively pleaded as *res judicata*, estoppel and as an election of remedies.

4. The courts below erred in refusing to declare and apply the law of waiver and the law on the construction and effect of an independent covenant in a lease as declared by the highest Missouri courts, and erred in applying principles of law which are declared for and limited to option agreements and which have no application under Missouri law to independent covenants made mandatory by a penal bond.

5. The courts below erred in refusing to declare and apply basic principles of Missouri landlord and tenant law and erred in setting aside the declared social and economic public policy of Missouri on important questions of local landlord and tenant law in ruling that the doctrine of anticipatory repudiation applies to Missouri leases.

V.

SUMMARY OF ARGUMENT.

1. The total amount in controversy, if Missouri law was applied, could not exceed $400 for one quarter's rent. If surrender of the lease was accepted, all liability was discharged. If it was not accepted, the maximum possible recovery was $400. Jurisdiction was usurped by refusal to declare and apply Missouri law and by holding that the doctrine of anticipatory repudiation applies to leases when the highest Missouri courts have ruled to the contrary.

2. The doctrine of anticipatory repudiation has been expressly denied for leases by the highest Missouri courts.

It has been consistently ruled that after acceptance of surrender or actual or constructive re-entry by the landlord after abandonment all unaccrued lease obligations are discharged in the absence of an independent covenant which survives termination of the lease. No covenant of that kind is claimed for this lease.

3. Respondent by suffering adverse final judgment in a suit filed in the same district court, to enforce the building covenant of the lease and to recover penalty on the bond guaranteeing erection of the building, was estopped by the principles of *res judicata,* election of remedies and estoppel by judgment from asserting that the building covenant was not discharged and that it was not an independent covenant and that a performance of the covenant was a condition for the exercise of the right of termination granted by the lease.

4. Because of express waiver of the building covenant and because the covenant was an independent one, the performance of which was made obligatory by penal bond, compliance with the building covenant in 1914 was not a requirement for exercise of the surrender right after 1914. The waiver was equivalent to performance. Performance of an independent covenant is not required where it is compensable in damages as a condition for exercise of the contract right of termination of liability contained in the lease.

VI.

ARGUMENT.

I.

The Total Amount in Controversy under Missouri Law Was $400, for One Quarter's Rent. If Surrender of the Lease Was Accepted All Liability Was Discharged. If It Was Not Accepted the Maximum Possible Recovery Was $400. Jurisdiction Was Usurped and Due Process of Law and Equal Protection of Laws Was Denied by Refusal to Apply the Law Consistently Declared by the Missouri Supreme Court En Banc Which Denies the Doctrine of Anticipatory Repudiation for Leases.

All obligations legally due were fully paid to June 30, 1940, when lessees under claim of right surrendered the premises to terminate further personal liability under lease provision set out in the "summary" (page 4). If liability thus terminated, there was no further obligation (Tr. 47, Par. 16) (Answer and motion to dismiss, Tr. 24-25).

If not, the maximum liability possible was $400 rent due July 1, 1940, which respondent demanded by letter of July 3rd (Tr. 45) after advising by letter of June 28th (Tr. 45) that "he refuses to accept surrender." Taxes did not mature until December.

The legerdemain (not recognized as such below), on which alone respondent depended, started with letter of July 11th offered as a "two-edged sword." He voluntarily advised that "he was agreeable to leasing his interest" to "minimize his damages" but "with full reservation of rights against you" (Tr. 46, Par. 14).

If the former lessees owning one-third of the fee in common with him demurred in any way, that would deny his fee title and waive their surrender. If they joined

in renting their interest with him as demanded, it would be with full reservation of his rights (whatever they were). Renting at his demand was "without waiver of the respective rights of the parties" (Tr. 47). The fact of renting or re-entry itself is expressly admitted but is not waived (Par. 17, Tr. 47) but preserved by non-waiver.

The new tenant paid rent from August 1, 1940. Respondent sued August 2nd, basing the damages asserted by his complaint on the rent received and he offered proof of it at the trial (Tr. 55-63). His letter of July 11th; re-entry and suit served as withdrawal of his first refusal to accept surrender and of his demand for rent. He realized with only $400 involved there was no Federal jurisdiction. He accepted the surrender made as "thus repudiating the lease in its entirety" and his complaint (Tr. 2) so pleads. That accords with the Missouri doctrine applicable to commercial contracts, as stated in *Kurth* v. *Morgan*, (Mo. App.) 277 S. W. 50, l. c. 54, and thereby plaintiff sought to adopt:

> "the renunciation of a contract by so acting upon it as, in effect, to declare that he treats the contract as at an end except for the purpose of bringing an action upon it for damages sustained by him in consequence of such renunciation."

When confronted with the cases cited in the next Point and by *Babcock* v. *Rieger*, (Mo. App.) 76 S. W. 2d 731, 735, reading:

> "On default of tenant the landlord has three options:
>
> Option 1. To remain out of possession, treat term as subsisting and recover rent.
>
> Option 2. Give notice to tenant, resume possession and re-let to mitigate damages, collecting loss from tenant.
>
> Option 3. Re-enter, resume possession in own right and close the term. If no notice is given and

> landlord resumes possession, he is deemed to be doing so to terminate the lease."

he equivocated and the courts below accepted it. The opinion says he "protected his legal rights." That understates it because he attempted creation of non-existent rights. His change of position was that consent of petitioner to renting waived it. But *Gallop* v. *Murphy*, 160 Mo. App. 1, 141 S. W. 438, 439, says:

> "The facts disclosed a surrender by operation of law. Such a surrender takes place when by consent of both parties another becomes a tenant of the premises and the landlord collects rent from them."

See also to the same effect, *Smyth* v. *Boroff*, 135 S. W. 973, 975, 156 Mo. App. 18.

Why his letter of July 11th and his complaint did not constitute acceptance of surrender is not explained. Missouri law permits no such equivocation. Surrender must be accepted or refused.

Acceptance of surrender discharged the lease under Missouri law. Nothing was due.

Refusal to admit acceptance of surrender left respondent with only a claim of $400 rent due under the lease.

There was no actual federal jurisdiction either way.

Plain Missouri law was disregarded and equal protection of law was denied. Jurisdiction was not real, but only apparent through denial of equal protection of laws. The judgment is *coram non judice* because it rests on denial of due process of law as well as denial of equal protection of laws.

The discharged lease was enforced after re-entry, although it contained no covenant of indemnity to survive re-entry, or for acceleration of unaccrued payments, or for commutation at any interest rate. Plaintiff sought substitution of damages for all existing contracts rights, but none remained. Sec. 313 and Sec. 290, Restatement of Contracts. The judgment for him overthrows every

basic principle of Missouri law declared and consistently enforced by its courts at least since the adoption of the "Landlord & Tenant Act" still in force since 1855.

II.

The Decision of the Circuit Court of Appeals and Judgment of the District Court Denied Equal Protection of Laws in a Diversity of Citizenship Case. The Basic Principles of Missouri Landlord and Tenant Law and the State's Declared Social and Economic Public Policy on Important Questions of Local Law Were Set Aside in Direct Conflict with Controlling Decisions of the Missouri Supreme Court, En Banc, on the Same Matters.

(District Courts of the Eighth Circuit are bound by the opinion to decide similar cases contrary to the decisions of the highest Missouri Courts.)

The judgment and decision below declares: "the doctrine of total breach by anticipatory repudiation is applicable to contracts of lease" in Missouri (Tr. 107-8), and "the courts of Missouri do not appear to have passed upon the precise point" (Tr. 103).

That doctrine has three times been expressly denied for 99-year leases by the Missouri Supreme Court, *En Banc*, and has been consistently denied by the Supreme Court and Courts of Appeals for long or short term leases. Acceptance of surrender or actual or constructive re-entry by the landlord after abandonment is uniformly held to discharge the lease and to prohibit recovery for breach of all future unaccrued covenants. Here the surrender was accepted and re-entry was actual by re-renting and constructive by suit which disclaimed any rights of the former tenants under the lease. These cases deny the doctrine approved below applies to leases:

Blond v. *Hoffman*, 343 Mo. 247, 121 S. W. 2d 137.

Blond v. *U. S. F. & G. Co.*, 336 Mo. 684, 80 S. W. 2d 675.

Blanke Bros. Realty Co. v. *American Surety Co.*, 297 Mo. 41, 247 S. W. 797.

Von Schleinitz v. *North Hotel Co.*, 323 Mo. 1110, 23 S. W. 2d 64.

Sharon v. *American Fidelity Company*, 157 S. W. 972, 172 Mo. App. 309.

In each case repudiation or abandonment occurred before actual or constructive re-entry or acceptance of abandonment or surrender. Opinion Note 22 cites the *Von Schleinitz* case but overlooked its application in ruling on the right to maintain suit. Acceptance of repudiation is essential to maintain action for anticipatory breach of commercial contracts but its recognition for a lease equals constructive re-entry and effects a discharge of unaccrued covenants.[2] That the doctrine approved below contravenes Missouri law is shown by the uniform denial of recovery in all except the *Sharon* case.

Sharon tendered the benefits of the lease to defendant guarantor and *held them open for it at all times until after the accrual date of the covenant* guaranteed by the bond. Nothing of that kind was done here.

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[2]See cases cited in Opinion Note 2. There is no inequity in the result for the landlord may protect himself by a suitable covenant in his lease. *St. Louis Bill Posting Co.* v. *Stanton*, 172 Mo. App. 40, 154 S. W. 821; *Re McAllister Mohler Company*, 46 F. 2d 91, 95; *Wm. Filene's Sons* v. *Weed*, 245 U. S. 597, 38 S. Ct. 211, 62 L. Ed. 497; *Gardiner* v. *William S. Butler & Co.*, 245 U. S. 603, 38 S. Ct. 214, 62 L. Ed. 505; *Irving Trust Co.* v. *Perry*, 293 U. S. 307, 55 S. Ct. 150, 79 L. Ed. 379; *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U. S. 433, 57 S. Ct. 292, 81 L. Ed. 324.

In applying the "anticipatory repudiation" theory only to commercial type contracts, the Missouri courts observe the limitations pointed out by this court in: *Roehm* v. *Horst*, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, cited (309 Mo. 276, 274 S. W. 699, l. c. 703); *Central Trust Co.* v. *Chicago Auditorium Co.*, 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811; *Gardiner* v. *Wm. S. Butler & Co.*, 245 U. S. 603, 38 S. Ct. 214, 62 L. Ed. 505; *New York Life Insurance Co* v. *Viglas*, 297 U. S. 672, 680, 56 S. Ct. 615, 80 L. Ed. 971, 976. The last three cases specifically except leases.

Anticipatory repudiation denied for leases.[3]

Many of the details in *Blond* v. *Hoffman* are amazingly parallel to this case. Where they differ they are legally equivalent to make operative the same rules of law. Blond's re-entry was accompanied by forfeiture notice, served after abandonment and repudiation. Re-entry here followed a contract right of surrender. Re-entry, admitted by agreed statement (Tr. 47, Par. 17), was made within the July quarter and discharged rent from then, as the *Sharon* case holds rent is not apportionable. Plaintiff had no claim for suit.

From *Blond* v. *Hoffman* we quote the following from abstract of briefs and argument at 343 Mo. l. c. 248 (which is not shown in the 121 S. W. 2d report) (*En Banc*):

> "* * * The petition was amended after the previous judgment was reversed and the cause remanded and new evidence was introduced showing that the *lessee had abandoned, renounced, and repudiated the lease and had taken bankruptcy,* thereby disabling himself from performing his obligations. *Title & Trust Co.* v. *Durkheimer Inv. Co.*, 63 Pac. 2d 909; *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581, 36 S. Ct. 412; *In re Neff*, 157 Fed. 61; *Gabriel* v. *Brick Co.*, 57 Mo. App. 526; *Porto Rico* v. *Title Guar. Co.*, 227 U. S. 382, 33 S. Ct. 362; *Sharon* v. *Amer. Fidelity Co.*, 172 Mo. App. 309, 157 S. W. 972."

This is from the opinion, 343 Mo. l. c. 250, 251, 121 S. W. 2d l. c. 138:

> "* * * At the second trial plaintiffs introduced evidence tending to prove that Hoffman, by his con-

---

[3]The recovery here is subject to the same vice as that in *Miller* v. *Irving Trust Company*, 296 U. S. 256, 56 S. Ct. 189, 80 L. Ed. 211, where this court reversed because the complaint was not supported by the contract it alleged. There was no provision in the lease there for recovery after termination. Such a provision is not claimed for this lease.

duct, had indicated that he had abandoned the lease. No such evidence was introduced at the first trial. This, plaintiffs insist, changed the situation and entitled them to a judgment for the full amount of the bond. We do not think so. Plaintiffs took affirmative action in declaring the lease forfeited. They took absolute possession of the property and notified Hoffman that he had no rights on the premises. Plaintiffs took their choice of ending the relationship of lessor and lessee. Such action, *whether considered as an acceptance or an abandonment of the lease by the lessee*, or an absolute forfeiture by the lessor, accompanied with taking of possession, discharged Hoffman and his surety from covenants which were not breached and which were to be performed in the future. In 36 Corpus Juris 337, Section 1144, we read:

> 'The surrender of the leased premises by the tenant extinguishes the relation of landlord and tenant, and ordinarily releases the tenant from liability for rent accruing thereafter.'

Again in 36 Corpus Juris 338, Section 1146, we find the following:

> 'In order that the attempted surrender shall release the tenant from further payment of rent, it must be accepted by the landlord. Where, however, there has been such an acceptance, the surrender becomes complete and the tenant, in the absence of an agreement to the contrary, is discharged from liability for subsequently accruing rent (See also *Ehlert* v. *Woods*, (Idaho) 63 Pac. 2d 1000; *Sjoberg* v. *Hartz*, (Minn.) 271 N. W. 329; *Von Schleinitz* v. *North Hotel Co.*, 323 Mo. 1110, 23 S. W. 2d 64, l. c. 74-78 (1, 2), and authorities there cited; *St. Louis Billposting Co.* v. *Stanton*, 172 Mo. App. 40, 154 S. W. 821).'

In the Von Schleinitz case *the tenant abandoned the leased premises. The landlord entered into possession and leased the property to a third party.* This court held that *the lessor had accepted the abandon-*

> *ment and thereby terminated the lease.* This court also held that future rents could not be collected unless the lessor had notified the lessee that he was taking possession for the lessee's benefit" (Italics ours).

The only notice here was the landlord wanted to lease to a new tenant to mitigate *his damages.* That recognized no beneficial interest of the former tenants under the lease.

In the *Blond* case, as here, the lot was vacant. Hoffman, the tenant, paid no rent after October. The original briefs there show that Hoffman declared in October that he gave up the lot; he would not build and would go bankrupt, as he later did, as shown by the opinion on the second appeal. The facts are stated in more detail in *Blond* v. *U. S. F. & G. Co., supra,* which was the first appeal.

Blond gave forfeiture notice in March and May, following Hoffman's abandonment of the vacant lot and repudiation of obligation in October preceding. Constructive re-entry was then made by posting a "For Rent or Sale" sign. Here actual re-entry was made by renting to a new tenant and constructive re-entry by suit denying beneficial interest of the former tenants under the lease.

The *Blanke Bros. Realty Co.* v. *American Surety Co.* case, 297 Mo. 41, 247 S. W. 797, l. c. 800, says (*En Banc*):

> "In the bond before us there is no provision fixing liability of the surety in the event of the *abandonment of the lease by the Marsix Company and re-entry* by the lessor. * * *
>
> As said in the Sharon Case:
>
> 'If the landlord, *confronted with the lessee's default* and knowing his remedies, *elects to* exercise that which destroys the relation, *terminates the tenancy and avoids the lease,* he deprives himself of any right to rent accruing after

his severance of the relation and taking back the property.'

If he deprives himself of the rent, he also deprives himself of the benefits accruing to him from the other provisions of the lease.

In *Mullaney* v. *McReynolds*, 170 Mo. App. 406, l. c. 414, 155 S. W. 485, it is held that failure to pay the rent reserved and abandonment of the leased premises by the lessee gives lessor the right to re-enter the premises, and, when he does forfeit the lease and re-enter, the lease is terminated.

In *G. M. Mining Co.* v. *Hodge*, 185 Mo. App. 138, at page 147, 170 S. W. 689, 691, it was said:

> '*Any act amounting to an agreement* on the part of the tenant to abandon and *on the part of the landlord to resume* possession of the demised premises *amounts to a surrender by operation of law.*'

In *American Bonding Co.* v. *Pueblo Inv. Co.*, 150 Fed. 17, l. c. 21, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357, it was said:

> *'The surrender of leased premises by the tenants during the term of the lease and the acceptance of the property by the landlord, without a notice that the latter takes and will hold and use it during the remainder of the term for the use and benefit of the tenants exclusively, closes the term* of the lease, and destroys all rights conditioned upon its subsequent continuance' " (Italics ours).

The *Von Schleinitz case* (cited in opinion Note 22, but not applied) is quite lengthy, 323 Mo. 1110 to 1149. Numerical reference is made below to paging of the official report for convenience of the court.

Von Schleinitz prayed $37,137 for accrued and *unaccrued rents* (1114) and enforcement of a lien under

his lease. *Unlike the lease here* it contained a clause providing that after re-entry, *"the obligation to pay rent for the full period of this lease shall not cease"* (1116). The court says (1138):

> "* * * But there is not a scintilla of evidence that plaintiff made any protest to Long against resuming possession of the premises, or that plaintiff informed or notified Long, as the agent and representative of the North Hotel Company, that plaintiff was taking possession of the premises for the benefit and account of the North Hotel Company, and would hold the North Hotel Company, as tenant, liable for the payment of any loss or deficiency of the future and unaccrued rents. * * * Furthermore, the written tender of possession made to defendants Hurst and Greer contains no recital or statement to the effect that plaintiff has resumed actual possession of the hotel premises under protest, or that possession of the premises is taken and resumed by plaintiff for the benefit and account of Hurst and Greer, or of the tenant, North Hotel Company, or that plaintiff will hold Hurst, Greer, or North Hotel Company, liable for any loss or deficiency of the unaccrued and future rents. * * *"

and at 1141:

> "* * * The original lease from Mehornay to Josephson provides that the 'sum of $15,000 (increased to $17,500) paid as advance rent * * * shall be bound by and subject to the payment of the rent herein provided for.' *The acceptance by appellant* (by operation of law) *of the surrender of the leased premises by the tenant*, North Hotel Company, *terminated the relation of landlord and tenant theretofore existing between said parties, in consequence of which the North Hotel Company was relieved of its liability for payment of the stipulated rents accruing after the month of March, 1925* * * *" (italics ours).

and at 1134-36 the scope of the ruling in *Producers Packing Co.* v. *Fischer* (Tr. 103, 108) (cited in opinion notes 2 and 15 as impliedly authorizing this suit) is defined

to be in accord with denial of recovery to Von Schleinitz. The Supreme Court quotes the following from the Producers Packing Case (1135-36):

> "'* * * Defendants, however, claim that plaintiff, upon the abandonment of the premises and equipment by Branson, having forfeited the lease and taken possession of the premises and operated the ice plant and machinery, elected to terminate the lease on September 13, 1923; that plaintiff's conduct terminated the lease and with it all unaccrued liabilities of the lessee upon his covenants and stipulations in the lease dependent upon the continuance of the term; that the principal not being liable for these, the sureties are not; that plaintiff is now suing for damages suffered after re-entry, and cannot recover the same, but the only items of damage that it may recover * * * is for the rent and liabilities accruing previous to the re-entry. We think there is no question but that defendants' contention is well taken (citing authorities).'"

Sharon v. *American Fidelity Company*, 172 Mo. App. 309, 157 S. W. 972, l. c. 975, says:

> "In the circumstances we think Kersting's actions *constituted an abandonment* of the lease. He defaulted in the rent and *compelled plaintiff*, for his own protection, *to enter*, he, Kersting, getting out without protest or an offer to make the improvements. * * *
>
> * * * But the law seems the same (at least we will concede it is the same), *even though the lessee is at fault*, and the *landlord may rightfully enter* and declare a forfeiture. Rent is a compensation for the use and occupation of the premises; and, in the absence of a contrary provision, when the latter ceases, rent does also. So, if the *landlord*, confronted with the lessee's default and knowing his remedies, *elects to exercise* that which destroys the relation, terminates the tenancy and *avoids the lease*, he *deprives himself of any right to rent accruing after his severance of the relation* and taking back the property. * * *" (Italics ours).

Recovery was permitted only because the landlord held the premises at all times until after accrual of the covenant with express invitation to the surety to accept the benefits of the lease. The re-entry here made and the suit disclaiming that the former lessees were entitled to any benefits under the lease forecloses possibility of maintaining the action.

That Missouri follows the New York rule in repudiating the doctrine in lease cases is shown also by *Puckett* v. *National Annuity Ass'n*, 134 Mo. App. 501, 114 S. W. 1039, which cites the leading New York case of *McCready* v. *Lindenborn*, 172 N. Y. 400, 65 N. E. 208.

For brevity, we refer and adopt our discussion of these cases, and of the economic and social public policy of Missouri, as set forth in Petition for Rehearing, Subd. VI, Tr. 126 to 130.

Litigation of this type frequently recurs. Under the Missouri statutory scheme, all possessory actions between landlord and tenant, except ejectment, must originate in the Justice of the Peace Courts. Most Justices of the Peace are not lawyers. Through natural respect for "federal law" this case will no doubt be followed and Missouri law denied until the appellate courts of Missouri have opportunity to expressly renounce the case as contrary to Missouri law. It is a matter of serious moment to every owner and tenant from the largest business house to the share croppers in Southeast Missouri who recently became a State and Federal problem as they lined the roads after crop failures. There is again a separate "federal rule" on this important subject.

III.

The Courts Below Failed to Declare and Apply the Missouri Law Declared by Its Highest Courts to Apply to Judgments Which Were Expressly Pleaded As Res Judicata, Estoppel and As Election of Remedies.

The facts are fully stated in the "Statement and Summary," and were argued at length in petition for re-

hearing (Tr. 120-123). For brevity, without minimizing their importance, the statement and argument so made is adopted by reference. The decision below directly conflicts with the following controlling Missouri cases:

Fulton Iron Works v. *Riggin*, 14 Mo. App. 321.

Case v. *Sipes*, 280 Mo. 110, 217 S. W. 306, 309, subd. 10.

Custer v. *Kroeger*, 313 Mo. 130, 280 S. W. 1035, subds. 5-6.

Cordia v. *Matthes*, 344 Mo. 1059, 130 S. W. 2d 597.

In re McMenamy's Guardianship, 307 Mo. 98, 270 S. W. 662, l. c. 667, 674.

It conflicts also with Section 449, Restatement of the Law of Contracts, and with the following decisions of this court:

Jackson v. *Irving Trust Co.*, 311 U. S. 494, 61 S. Ct. 326, Adv. Op., 85 L. Ed. 310.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263, subds. 18-24.

Kessler v. *Eldred*, 206 U. S. 285, 27 S. Ct. 611, 51 L. Ed. 1065.

The Johnson Co. v. *Wharton*, 152 U. S. 252, 14 S. Ct. 608, 38 L. Ed. 429.

IV.

The Courts Below Refused to Declare and Apply the Missouri Law of Waiver, and Its Law on the Construction of Independent Covenants in a Lease, As Declared by Its Highest Appellate Courts, and Erroneously Applied a Rule Declared for and Limited to Option Agreements, Which Has No Application to Independent Covenants.

The facts are fully stated in the "Summary and Statement," and were argued in the petition for rehearing (Tr. 118-123). For brevity, without minimizing their importance, the facts and argument are adopted by refer-

ence. The opinion below conflicts directly with the law declared in:

Freeland v. *Mitchell*, 8 Mo. 487.

Butler v. *Manny*, 52 Mo. 497, l. c. 506, 507.

Garnhardt v. *Finney*, 40 Mo. 449.

Watson Fireproof Window Co. v. *Henry Weiss Cornice Co.*, 168 S. W. 905, l. c. 907, 908, 181 Mo. App. 318.

The court erroneously applied the law of option agreements, as pointed out (Tr. 124) in the petition for rehearing, which has no application to independent covenants such as this lease contains and which are erroneously construed.

On the question of waiver of the building covenant being equivalent to performance the opinion conflicts directly with:

Springfield Gas & Electric Co. v. *Southern Surety Co.*, 250 S. W. 78, l. c. 81 (Mo. App.).

Bonnot v. *Grand Lodge, etc.*, 81 S. W. 2d 360, 367, subds. 6, 7, 229 Mo. App. 519.

District of Columbia v. *Camden Iron Works*, 181 U. S. 453, 463, 21 S. Ct. 680, 45 L. Ed. 948, 954.

CONCLUSION.

We respectfully submit that the grave public importance of the questions involved, and the establishment of a separate "federal rule" in landlord and tenant cases contrary to decisions of the highest Missouri courts impels issuance of the writ.

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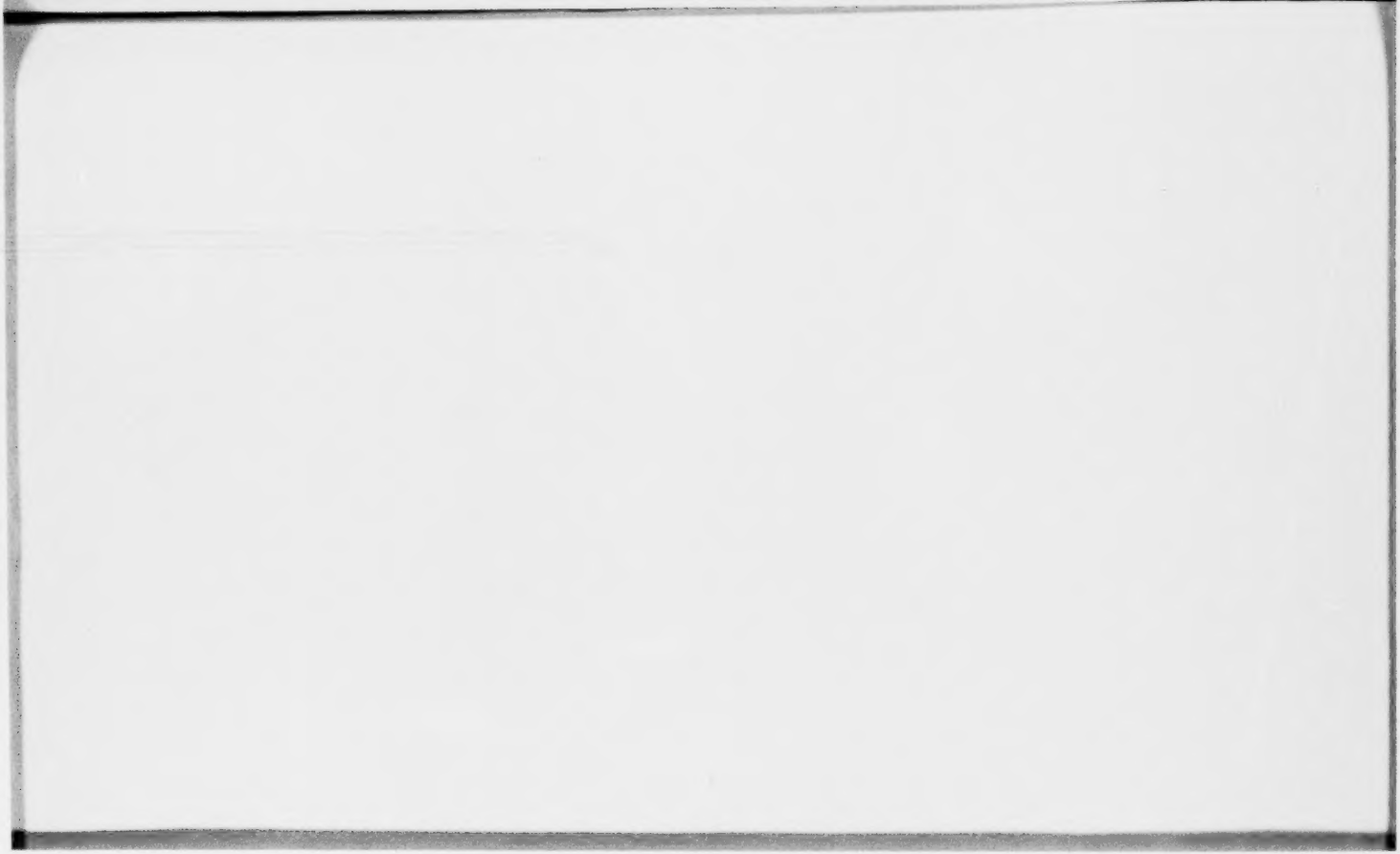

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In the Supreme Court of the United States

October Term, 1941.

No. 742.

AXEL HAWKINSON, *Petitioner and Appellant Below,*

vs.

GEORGE GASTON JOHNSTON, *Respondent and Appellee Below.*

GEORGE GASTON JOHNSTON, *Respondent and Appellant Below,*

vs.

AXEL HAWKINSON, *Petitioner and Appellee Below.*

OPPOSING BRIEF OF GEORGE GASTON JOHNSTON TO PETITION FOR WRIT OF CERTIORARI.

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OPPOSING BRIEF OF GEORGE GASTON JOHNSTON TO PETITION FOR WRIT OF CERTIORARI.

The basis of the petition for writ of certiorari is that the decision of the Circuit Court of Appeals and the judgment of the District Court denied equal protection of the laws in a diversity of citizenship case in that the principles of Missouri landlord and tenant law and the state's declared social and economic policy on important

questions of local law were set aside, in direct conflict with controlling decisions of the Missouri Supreme Court on the same matters.

This complaint possibly comes under Sec. 5(b) of Rule 38 of this Court, and none other. Such rule provides:

> "Where a circuit court of appeals has * * * decided an important question of local law in a way possibly in conflict with applicable local decisions * * *."

The Court of Appeals had the determination of the local law very much in mind in considering its decision, as evidenced by the opinion of the Court. It states (Trans. 101):

> "Two principal questions are presented for determination: (1) Whether a repudiation of a lease and an abandonment of the premises accompanied by a default in the payment of an installment of rent may constitute a total breach of contract of lease under the law of Missouri."

The second question appertains only to the matter of damages.

And again the Court said (Trans. 103):

> "The first and principal question is whether under the law of Missouri, a repudiation of a lease and an abandonment of the premises, accompanied by a refusal to pay an accrued installment of rent, can constitute a total breach of the contract of lease. The courts of Missouri do not appear to have passed upon the precise point. The general doctrine of anticipatory breach by repudiation has, however, been clearly recognized in that state. [Citing five Missouri cases and the Restatement of the Law of Contracts, Mo. Ann.] A majority of the courts in this country that have passed upon the question have applied the doctrine of total breach to an anticipatory repudiation or

> other unjustified refusal to perform some material, permeating provision of a contract of lease [referring to 13 states and probably Iowa, Minnesota and Oregon], and the trial court held that, since there was nothing contrary to such a view in the expressions of the Missouri courts on the subject of anticipatory repudiation, it was proper to assume that Missouri would follow the general law."

Then having analyzed the Missouri cases and referring to the Restatement, the Court of Appeals finds (Trans. 107):

> "We hold that, within the conditions and qualifications of the rule applied to general contracts under the Missouri decisions, the doctrine of total breach by anticipatory repudiation is applicable to contracts of lease in that state. This is sufficient to sustain plaintiff's right to sue in the present case."

With the Missouri authorities recognizing the applicability of anticipatory breach to cases involving ordinary contracts and certain covenants in leases, and the weight of authority in other states, recognizing the applicability of the doctrine, the Court of Appeals had aught else to do but to apply the doctrine to this instance of breach and repudiation of a lease contract. Instead of being the subject of criticism for so doing, the Court of Appeals would be the subject of criticism had it not done so.

Petitioner is quite mistaken (Petitioner's Brief 22) when he says: "That doctrine (anticipatory breach) has three times been expressly denied for 99-year leases by the Missouri Supreme Court *en banc* • • •." The petitioner cannot make it true by mere assertion. Counsel for Johnston searching diligently could find no such cases. The District Court could find none. The Court of Appeals could find none, and so states in its opinion (Trans. 103).

But let us go further and analyze the cases which petitioner cites in support of his assertion (Petitioner's Brief 22). Each of these cases, save one, is a case in which the lessor declared a forfeiture and took possesion of the property, electing to have possession, rather than personal right of action against the lessee. Lest there be any question that this is correct, let us quote briefly from these cases.

In *Blond* v. *Hoffman,* 343 Mo. 247, 121 S. W. (2d) 137, the Supreme Court of Missouri, sitting *en banc,* said:

> "Plaintiffs took affirmative action in declaring the lease forfeited. They took absolute possession of the property and notified Hoffman that he had no rights on the premises. Plaintiffs took their choice of ending the relationship of lessor and lessee. Such action, whether considered as an acceptance or an abandonment of the lease by the lessee, or an absolute forfeiture by the lessor, accompanied with taking of possession, discharged Hoffman and his surety from the covenants which were not breached, and which were to be performed in the future."

In *Blond* v. *U. S. F. & G. Co.,* 336 Mo. 684, 80 S. W. (2d) 675, 677, the Court said:

> "Appellant and also respondents have cited the cases of *Blanke Bro. Realty Co.* v. *American Surety Co.,* 297 Mo. 41, 247 S. W. 797 (court *en banc*), and *Sharon* v. *American Fidelity Co.,* 172 Mo. App. 309, 157 S. W. 972, as supporting their respective contentions. From a reading of the two cases and the authorities cited in the course of the opinions, it will be noted that it is well settled law that a forfeiture of a lease by the lessor and his taking possession of the leased premises without any reservations in favor of the lessee terminates absolutely the relation of lessor

and lessee and discharges all the obligations of the lessee, not breached, which were to be performed after the date of taking possession."

In the case of *Blanke Bros. Realty Co.* v. *American Surety Co.,* 297 Mo. 41, 247 S. W. 797, 798, it appears:

"On July 30, 1914, the Blanke Co. served notice of forfeiture of said lease upon the Marsix Co."

In *Sharon* v. *American Fidelity Company,* 157 S. W. 972, 172 Mo. App. 309, it appears:

"Plaintiff (lessor) then about six months before the two years limited for the first improvements had expired took possession of the property * * *."

The only case which differs from these cases of declared forfeiture and resumption of possession on the part of the lessor is *Von Schleinitz* v. *North Hotel Co.,* 323 Mo. 1110, 23 S. W. (2d) 64. It is there said:

"We have searched the record herein in vain for any evidence however slight tending to show that the plaintiff, Von Schleinitz, or any agent on his behalf, protested to the tenant and lessee, North Hotel Company, against the abandonment and surrender of the leased premises, or that plaintiff, Von Schleinitz, informed the tenant, North Hotel Company, or any representative or agent thereof, that plaintiff resumed possession of the leased premises for the benefit and account of the North Hotel Company, and would look to such corporate tenant for the payment of any loss or deficiency of the stipulated rents."

Hence it is apparent in such case that there was no protest made by the lessor and no affirmative action taken by the lessor. The lessor's inaction and failure

to state his position, together with his resumption of possession without reservation, was held in law to constitute acquiescence to the surrender. Lessor Johnston in the instant case never acquiesced, and never accepted surrender, as we will show by quotation from the decision of the Court of Appeals.

None of these authorities control or affect the decision in the instant case. Here the lessee repudiated the lease, walked out and abandoned the premises, over the warnings and repeated protests of the lessor. That the lessor did not accept the lessee's repudiation of the lease plainly appears in the last paragraph of the opinion, which states (Trans. 112):

> "Defendant further argues that plaintiff's actions in the situation amounted to an acceptance of surrender, and so precluded a suit for repudiation. We find nothing in the evidence that compels or merits this construction. Plaintiff, from the start, had notified the lessees that he would not accept a surrender, and had advised them in effect that their inexcusable attempt to abandon the premises and their unjustifiable refusal further to perform the obligations of the lease would be regarded as a repudiation. He had informed defendant, after the abandonment, that he would be willing to work out some arrangement to lease the premises in order to minimize the damages, but that 'any such arrangement will, of course, be with full reservation of his rights against you.' Such an arrangement was finally agreed upon, for a leasing of the premises to a third party, 'without waiver of the respective rights of the parties.' There is nothing in any of these actions, or in the institution of a suit for damages ir harmony with them, that must or can be held to have consummated a surrender, as a matter of necessary legal implication. Plaintiff's whole course, on the contrary, was a studied effort to preserve his legal rights on the contract, and to avoid any act that could be declared to be inconsistent with them."

Passing to petitioner's fourth ground for granting the writ (Petitioner's Brief 31), that the courts below refused to declare and apply the Missouri law of waiver, etc., a statement of the facts, upon which the alleged waiver is based, from the opinion of the Court of Appeals, should be enough to dispose of this contention. The Court of Appeals said (Trans. 111):

> "Defendant has argued a number of other contentions, with which we are unable to agree, and which require only a brief discussion. Thus, he contends that his abandonment of the property and his refusal to continue performance of the lease were not an actionable repudiation, but a justifiable surrender. The argument seeks to ground itself on a covenant in the lease, which required the lessees to erect a building upon the property within five years from the commencement of the term, and which further provided that 'after the new building shall have been constructed, the personal liability of the lessees hereunder may be terminated by lessees having complied with all the terms and conditions of this lease which at that time lessees shall have agreed to perform, and by the lessees surrendering to the lessor the premises, and improvements thereon and the possession thereof.' The building was never erected, but plaintiff failed to bring an action upon the covenant until the statute of limitations had run against the obligation. When he attempted to sue, the court dismissed his action on the ground that it was barred by the statute of limitations.
>
> "Defendant argues that this left the situation the same as if the building had actually been erected, and entitled him to make a surrender accordingly. But it would indeed be the sheerest legal fiction to assert that the effect of the statute of limitations was to perform the lessees' obligation to erect a building."

In other words, petitioner had maintained in the Court of Appeals that a bar by limitation or alleged waiver stands for, or is the equivalent of, physical being; that this fiction of law is a substitute for the steel, brick and mortar out of which the building was to have been constructed. This specious theory was denied by the District Court and the Court of Appeals.

The applicability of the doctrine of anticipatory breach to real estate leases is no stranger to this Court. *Palmer* v. *Conn. Railway and Lighting Co.*, 311 U. S. 544, 61 S. Ct. 379, 85 L. Ed. 283. Its application is a question of local law. *Gardiner* v. *William S. Butler and Co.*, 246 U. S. 303; *Moore* v. *McDuffie*, 71 Fed. (2d) 729. Absent any decision of the State Court on the question, it is the province of the Federal Court to determine the law of the state, and in so doing, take into consideration the rules in other jurisdictions and any decision of the state court concerning matters of a relevant nature. *Schwager* v. *Schwager*, 109 Fed. (2d) 754. This the Court of Appeals did, and properly so, basing its decision to come within the intendment of the declared local law, as evidenced by the opinion (Trans. 103, Note 2) and the general law (Trans. 103, Note 3).

The petition is based upon matters not in accord with the deliberate consideration and findings of the Court of Appeals. As illustrated, there is no conflict with local law. Hence we submit that the petition is without substantial merit and should be denied.

Respectfully submitted,

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